IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1174

FEDERATION OF TELEPHONE WORKERS OF PENNSYLVANIA,
Petitioner

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,
Respondent

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,
Respondent

v.

FEDERATION OF TELEPHONE WORKERS OF PENNSYLVANIA,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS—(Continued)

Cases: Page

Statute:

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No.

Federation of Telephone Workers of Pennsylvania,
Petitioner

v.

The Bell Telephone Company of Pennsylvania,
Respondent

The Bell Telephone Company of Pennsylvania,
Respondent

v.

Federation of Telephone Workers of Pennsylvania,
Petitioner

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

Petitioner, Federation of Telephone Workers of Pennsylvania, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the District Court's entry of summary judgment for The Bell Telephone Company of Pennsylvania. The judgment of the Court of Appeals was entered on October 19, 1976, and the Petition for Rehearing and Suggestion for Rehearing In Banc was denied on November 26, 1976.

OPINIONS BELOW

The judgment order of the Court of Appeals (Appendix A herein) is not officially reported. The Court of Appeals' order denying rehearing in banc (Appendix B herein) is not officially reported. The opinion of the District Court for the Eastern District of Pennsylvania (Appendix C herein) is reported at 406 F. Supp. 1201.

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1976, and a Petition for Rehearing and Suggestion for Rehearing In Banc was denied on November 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Did the Court of Appeals err when it created a special exception to the general rule and held that the court, rather than the labor arbitrator, should interpret the meaning of a section of the collective bargaining agreement excluding certain grievances from arbitration?

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. §185(a).

STATEMENT OF THE CASE

The Federation of Telephone Workers of Pennsylvania (Petitioner herein) filed a complaint in the United States District Court for the Eastern District of Pennsylvania to enforce an arbitrator's award (Appendix D) against The Bell Telephone Company of Pennsylvania (Respondent herein). Shortly thereafter, Respondent filed a separate action requesting the court to vacate the arbitrator's award. Jurisdiction was based on §30(a) of the Labor-Management Relations Act, 29 U.S.C. §185(a). The two cases were informally consolidated before a single judge in the district court. Both parties filed motions for summary judgment in each action.

On November 26, 1975, the district court filed a Memorandum, Opinion and Order (Appendix C) in which it refused to enforce a major portion of the arbitrator's award. The district court found that the arbitrator lacked authority under the collective bargaining agreement to consider certain of Petitioner's grievances. As to five items in the award, the district court granted Respondent's motion for summary judgment, *i.e.*, vacated the award; as to one item the court granted Petitioner's motion for summary judgment, *i.e.*, enforced the award.

Petitioner appealed to the Court of Appeals for the Third Circuit from the judgment of the district court in both actions. The appeals were consolidated. On October 19, 1976, the Court of Appeals entered its judgment order (Appendix A) affirming without opinion, the judgment of the district court. On November 26, 1976, the Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc (Appendix B).

STATEMENT OF THE FACTS

A. The Collective Bargaining Agreement

On July 28, 1971, Petitioner and Respondent entered into a collective bargaining agreement (the Agreement).

The Agreement provides, in Article 2, that Respondent recognizes Petitioner as the exclusive representative of the bargaining unit (Plant Department) employees for the purpose of collective bargaining with respect to wages, hours and conditions of employment. The Agreement contains a detailed seniority clause in Article 9, a grievance procedure in Article 10, a promotion clause in Article 22, and a non-discrimination clause in Article 23. Article 10 (Grievances), 13 (Arbitration), and 22 (Promotions) are set forth in Appendix F.

GRIEVANCES

10.01 Any complaint or dispute arising between any employee and the Company shall be presented by the employee or by a Representative of the Union to the immediate supervisor of the employee in an effort to reach a mutually acceptable adjustment.

. . .

10.06 If, at any time, a controversy should arise between the Company and the Union regarding the true intent and meaning of any provision of this Agreement, the controversy may be presented for review in accordance with the preceding Sections of this Article. If the controversy is processed and is not satisfactorily settled under these Sections, the Union or the Company, by written notice specifying the Section of the Agreement alleged to be violated, may request a meeting between representatives of the Union and the Company in an effort to reach a mutually acceptable adjustment of the disputed matter. Notice must be given no later than fifteen days after the answer has been given at the Area level. A meeting will be held as promptly as possible and, in any case, within ten days from the date that it was requested unless a different date is mutually agreed to. If the controversy is not adjusted to the mutual satisfaction of the Union and the Company at such meeting, either party, no later than fifteen days from the end of such meeting, may submit the question under dispute to arbitration in accordance with the provision of Article 13 of this Agreement.

Article 13 provides as follows:

ARBITRATION

13.01 There shall be arbitrated only the matters specifically made subject to arbitration by the provisions of this Agreement.

13.02 The procedure for arbitration is set forth in Exhibit B attached to and made part of this Agreement. In making an award the Arbitration Board may not add to, subtract from, modify or disregard any contract provision. In no way shall this detract from the right of the Arbitration Board to interpret the meaning and application of any contract term in which the parties herein are in dispute as to such meaning and application.

Article 22 provides as follows:

PROMOTIONS

22.01 The Company will consider many factors including seniority, job performance, health, attendance record and experience in determining employees' qualifications for promotion within the bargaining unit.

22.02 The Union may call to the Company's attention particular employees whose seniority it believes

warrants recognition. The Company will give consideration to such employees, along with others, provided the individual employee so wishes.

22.03 The employee's Supervisor, if requested by an unsuccessful aspirant to do a job, will inform such employee of the reasons for the selection and review with him his own status.

22.04 It is understood that any dispute between the Union and the Company involving the terms of this Article may be grieved but shall not be subject to arbitration.

B. The Consent Decree

On January 18, 1973, a Consent Decree was entered by Judge A. Leon Higginbotham, Jr., of the United States District Court for the Eastern District of Pennsylvania, in Civil Action No. 73-149, which had been instituted by the United States Equal Employment Opportunity Commission, the Secretary of Labor, and the United States of America against the American Telephone and Telegraph Company (AT & T) and all its associated companies for alleged discriminatory employment practices. In this consent decree, AT & T and all its associated companies, including the Bell Telephone Company of Pennsylvania (Respondent herein), committed themselves to adopt affirmative action programs in order to insure the compliance by defendants with equal employment opportunity laws and equal pay for equal work laws. The Consent Decree contained the following language:

> Nothing in this Decree is intended to restrict the right of the Bell Companies, and the collective bargaining representative of their employees to negotiate alternatives to the provisions of this Decree which would also be in compliance with Federal law . . .
>
> Each Bell Company shall notify all appropriate collective bargaining representatives of the terms of this Decree and of its willingness to negotiate in good faith concerning these terms.

C. The Upward Mobility Transfer Program (UMTP)

Subsequent to the entry of the Consent Decree, Respondent adopted an Upward Mobility Transfer Program (UMTP). The UMTP was described by Respondent as a method by which a non-management employee could request consideration for transfer from one job to another. It covers transfers which can be characterized as promotions and demotions as well as lateral moves. Respondent claimed that the adoption of the UMTP was required by the Consent Decree. Petitioner disagreed. Petitioner took the position that the UMTP was not only *not* required by the terms of the consent decree, but that its unilateral imposition by Respondent and the unilateral establishment of new terms and conditions of employment, without negotiation with Petitioner, actually violated the terms of the Consent Decree as well as numerous sections of the collective bargaining agreement between the parties. Petitioner claimed that the application of the provisions of the UMTP affected a host of terms and conditions of employment covered by the collective bargaining agreement.

A number of grievances were filed by Petitioner on behalf of individual employees who had been denied promotions as a result of the changes in promotion procedure brought about by the UMTP. Petitioner also filed a number of broader grievances claiming that the unilateral adoption of the UMTP violated the collective bargaining relationship generally and that certain provisions of the UMTP violated specific sections of the Agreement.

All these grievances were taken to arbitration as a group pursuant to the collective bargaining agreement. Under the auspices of the American Arbitration Association, the parties selected Lewis M. Gill, Esquire, a well-known labor arbitrator, to hear the cases. On July 22, 1974, the arbitrator issued his award (Appendix D), di-

recting Respondent to take certain affirmative action and to revoke certain procedures which it had instituted as a part of the UMTP. On September 16, 1974, the arbitrator filed an opinion in support of the award (Appendix E).

D. The Arbitrator's Award and Opinion

The matter before the arbitrator was Petitioner's grievance that Respondent's unilateral adoption of the UMTP violated numerous provisions of the Agreement. Petitioner complained that the effect of the UMTP was to impose on employees and their bargaining representative a vast array of new terms and conditions of employment without Petitioner's agreement and this amounted to an amendment of the Agreement contrary to the terms of Article 14 thereof.[1] Petitioner claimed that the application of specific provisions of the UMTP directly violated employee rights under Articles 2, 9, 10, 22, and 23 of the Agreement. Petitioner also presented a number of grievances for individual employees who were adversely affected by promotions made by Respondent under the UMTP.

Respondent advanced a wide variety of objections to arbitration, including the claim that since the adoption of the UMTP was required by the Consent Decree, it was not subject to arbitration. The arbitrator found that certain provisions of the UMTP which Petitioner was grieving were, in fact, required by the Consent Decree and could, therefore, not be set aside by arbitration.[2] However, as to

1. Article 14 of the Agreement provides: "The entire understanding between the parties is set forth completely in this Agreement and the exhibits attached hereto. Any amendment to this Agreement or any interpretation of the true intent and meaning of the provisions of this Agreement will be committed to writing and signed by the duly authorized representatives of the parties."

2. As required by the Consent Decree, the arbitrator ordered the Company, upon the Union's request, to negotiate with respect to permissible changes in these items. Since the items were found to be required by the Consent Decree, pending such negotiation, these changes were to remain in effect.

eleven specific provisions of the UMTP, the arbitrator found that they were not required by the Consent Decree. (Although the district court did not reach the issue as to whether the arbitrator's award violated the Consent Decree, at the court's request, the Equal Employment Opportunity Commission filed a memorandum with the district court, dated April 30, 1975, in which it concluded that the implementation of the arbitrator's award would not conflict with the consent decree.)

Relying upon Article 22.04 of the Agreement, Respondent argued that the grievances presented by Petitioner covering individuals who had been denied promotions because of the application of the UMTP provisions were not subject to arbitration. The arbitrator found that indeed Article 22.04 precluded him from arbitrating the grievances covering questions of individual promotions (A.-22). He noted that the Article provided such disputes could be grieved but were not subject to arbitration. The arbitrator concluded that he could not consider these individual grievances even though he found that Respondent violated the provisions of the contract. He felt constrained by the plain language of the contract although this left the individuals in the anomalous position of not being able to gain redress for a clear contractual violation.

Respondent also argued that even Petitioner's general grievances attacking a wide variety of new procedures for job transfers contained in the UMTP were barred from arbitration by Article 22.04.

The arbitrator concluded that the effect of the exclusion from arbitration under 22.04 was "simply to rule out arbitration of individual grievances claiming improper denial of promotions under that Article, not to render unilateral changes in the general policy immune from review." (A.-25).

The authority of the arbitrator to interpret the provisions of the Agreement is specifically provided for in Article 10.06. In fact, in construing the extent of the

Article 22.04 exclusion, the arbitrator relied upon his power under Article 10.06 when he referred to the "true meaning and intent" of Article 22.04 (A.-25).

The arbitrator found that eleven specific provisions of the UMTP were not wholly or partially required by the Consent Decree. He therefore reviewed each of the eleven to determine whether it violated the Agreement. As to four of the items, he found no change from previous practice and therefore found no contractual violation. As to seven items, he found the procedures initiated by the UMTP changed or affected prior practice and could not be implemented unilaterally by Respondent. He ordered Respondent to set aside the changes required by the UMTP and to reinstate the prior practice. In each case, once the procedure was changed back to the status *quo ante* UMTP, the parties were ordered to negotiate changes.

E. The District Court Opinion

Since Respondent refused to comply with the award, Petitioner commenced its action to enforce the award. Respondent filed a separate action to vacate the award. The two cases were assigned to a single district judge who disposed of them as a unit. On November 26, 1975, the district court filed an Order, Memorandum and Opinion (Appendix C), granting enforcement of Item 9 of the award and denying enforcement as to Items 1 through 6.

The basis for the district court's refusal to enforce Items 1 through 6 of the award, stemmed from its disagreement with the arbitrator's conclusion as to the meaning of Article 22.04. Although the district court conceded that "an arbitrator's discretion is broad and entitled to judicial deference," it concluded:

> To embrace the argument advanced by the Union, and *erroneously accepted by the arbitrator*, would be to locate the arbitrator's authority in the 'true intent and meaning' language of §10.06, and thus render §22.04

> meaningless . . . But there comes a point where the cloak of his office will not suffice to conceal *utter absurdities* in his award, *especially when those absurdities are bereft of logic, contractual intent and legal authority. Absurdities in contract construction are not favored by the courts.* (A.-10) (Emphasis supplied.)

The district court, in granting Respondent's motion for summary judgment (in vacating the award as to six of the seven disputed items ruled on by the arbitrator), concluded that the arbitrator's interpretation of the Agreement was erroneous. The Arbitrator had interpreted the exclusionary language of §22.04 to apply to arbitration of individual grievances only, but not to exclude from arbitration wholesale across the board changes in Respondent's promotion policies. Although the district court did not, and could not, question the arbitrator's power and duty under §10.06 of the contract and under established law to interpret the terms of the contract, the district court set forth its disagreement with the construction rendered by the arbitrator. The basis of the District Court's disagreement with the arbitrator's interpretation of §22.04 appears to be that the arbitrator was construing the exclusion of promotion grievances from arbitration too narrowly.

F. The Judgment Order of the Court of Appeals

On October 19, 1976, the Court of Appeals for the Third Circuit affirmed, without opinion, the judgment of the district court (A.-1). On November 26, 1976, the Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc. (A.-2).

REASONS FOR GRANTING WRIT

I. The Decision of the Court of Appeals Presents an Issue Not Directly Dealt with by This Court; However, the Decision Below Conflicts With the Principles Laid Down by This Court in the Steelworkers Trilogy Cases.

A. The decision of the Court of Appeals conflicts with the principles established by this Court for reviewing an arbitrator's interpretation of a collective bargaining agreement.

The arbitrator in this case was presented with a question of interpreting the meaning of §22.04 of the labor agreement which excluded certain grievances from arbitration. Section 10.06 specifically cloaked the arbitrator with authority to interpret the meaning of the contract. The arbitrator interpreted the clause to exclude individual promotion grievances from arbitration, but not to exclude from arbitration broad policy grievances relating to promotions. The district court disagreed with the arbitrator's interpretation. Apparently, the district court felt that in this case, it had a broader scope of review of the arbitrator's interpretation of the labor agreement than it would normally have since the arbitrator was interpreting a section of the contract dealing with an exclusion from arbitration. The district court disagreed with the arbitrator's interpretation and felt obliged to reject it in favor of the court's own preferred interpretation.

In *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), this Court, in an action to enforce an arbitration award, reversed the judgment of the Court of Appeals which had refused to enforce the award. In this landmark case, the Court firmly established the guidelines to be followed by courts in proceed-

ings to enforce labor arbitration awards. The Court held that an arbitrator's award must be enforced:

> . . . so long as it draws its essence from the collective bargaining agreement. . . .
> . . . A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.
> . . .
> . . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. *It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.* 363 U.S. at 597-99. (Emphasis supplied.)

In *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960), decided the same day as *Enterprise Wheel*, above, the Court reversed the decision of the Court of Appeals refusing to compel arbitration under a collective bargaining agreement. The Court of Appeals had stated that the grievance was "frivolous" and "patently baseless" and not subject to arbitration under the contract. The Court there stated:

> The function of the court is very limited when the parties have agreed to submit *all questions of contract interpretation to the arbitrator.* It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances *the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.*

> *The courts, therefore, have no business weighing the merits of the grievance,* considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.
>
> . . .
>
> *When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.* 363 U.S. at 567-69. (Emphasis supplied; footnotes omitted.)

In the above cases, the Court did not directly deal with the question as to whether the same rule applies where the arbitrator is interpreting a section excluding certain matters from arbitration. Although the question in this case was plainly one of contract interpretation, the district court dealt with it as a question of substantive arbitrability for the court. However, there is no basis under the language or theory of *American Manufacturing* or *Enterprise Wheel*, above, to carve out a special exception to the general rule that questions of contract interpretation are for the arbitrator merely because the section of the contract subject to interpretation deals with arbitration. All the reasoning and policies underlying this Court's insistence that the arbitrator's interpretation of the contract terms is to prevail apply equally as strongly to interpretation of clauses excluding matters from arbitration. This reasoning is even stronger in this case where the contract, by its own terms, provides that the arbitrator has the authority to decide the "true intent and meaning" of the terms of the contract.

In the instant case, the District Court very clearly overruled the arbitrator's interpretation of Article 22.04 of the Agreement. The District Court stated:

> To embrace the argument advanced by the Union, and erroneously accepted by the arbitrator, would be to locate the arbitrator's authority in the 'true intent and meaning' language of §10.06, and thus render §22.04 meaningless. (A.-10)

In *American Manufacturing, supra, Enterprise Wheel, supra,* and *United Steelworkers v. Warrior and Gulf Navigation Company,* 363 U.S. 574 (1960), this Court set forth in detail the basis for its conclusions concerning the importance of arbitration in the structure of labor relations. This Court found in the Labor-Management Relations Act, a strong federal policy of settling labor disputes by arbitration. The central theme of the Steelworkers Trilogy is to avoid court interference with the arbitration process. In *Enterprise Wheel, supra,* the Court stated:

> The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. 363 U.S. at 596.

The Court in each of the Trilogy opinions emphasized the special role of arbitration and arbitrators as part and parcel of the federal labor law policy. This was not a mystical concept, but a carefully constructed one, designed to deal with the peculiar and unique problems of industrial relations. The federal policy of promoting industrial stabilization and peace is to be achieved in large part through the collective bargaining agreement and its arbitration process. The collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . It calls into being a new common law—the common law of a particular industry or of a particular plant."

The grievance machinery is "at the very heart of the system of industrial self-government." The grievance machinery is a system of private law for all the problems which may arise.

In this unique system the arbitrator "performs functions which are not normal to the courts." The arbitrator's

source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.

In this case, the arbitrator was called upon to contribute his expertise, his knowledge and experience in industrial relations in deciding the matters presented to him.

The arbitrator concluded that §22.04 simply did not exclude general promotion policy grievances from arbitration. His expertise was what the parties contracted for. The district court in vacating his award disregarded the special expertise and knowledge of the labor arbitrator. The court substituted its own legalistic interpretation for the expertised judgment of the arbitrator.

Just as the arbitrator was chosen as specially suited to interpret the other provisions of the contract, so is he peculiarly well prepared to decide the scope of the exclusionary language of §22.04. To give it meaning, the arbitrator had to consider the entire contract, the relationship between the parties, past practice, and the other myriad considerations which distinguish labor arbitration from ordinary legal proceedings.

Clearly, a reasonable and proper interpretation of Article 22, read as an integrated whole with the entire contract, would require arbitration if Respondent chose to completely and utterly ignore the existence of the Article in its entirety. Arbitrator Gill merely gave reasonable meaning to §22.04 in finding that it meant to exclude arbitration over individual promotion grievances. The considerations involved in rendering such an interpretation were peculiarly within the realm of expertise and competence of a labor arbitrator and not the courts.

The district court very plainly undertook "to determine the merits of a grievance under the guise of interpreting the grievance procedure of the collective bargaining agreement[s]." *American Manufacturing, supra,* at 569.

In doing so, it usurped the function entrusted to the arbitrator in contravention of the teachings of this Court.

The decision of the Court of Appeals carves out a wide and unjustifiable exception to the general rule excluding courts from interpreting the meaning of collective bargaining agreements. Such interpretations should be entrusted by the courts to the arbitrators chosen by the parties. Court interpretation of collective bargaining agreements should, as a matter of federal labor policy, be kept at a minimum.

To allow courts to render their own interpretations of labor agreements under the guise of deciding issues of substantive arbitrability, will quickly lead to an erosion of the arbitration process. Numerous questions of contract interpretation will be framed as questions of arbitrability as a means of inviting court intervention.

To date this Court has consistently upheld the policy of keeping the courts out of interpreting terms of labor agreements and of insisting that the parties abide by the interpretations rendered by the arbitrators they designated. This policy applies with equal force where the issue relates to a provision governing an exclusion from arbitration.

B. The decision of the Court of Appeals is in conflict with prior decisions of that Court.

In *Local 103, International Union of Electrical, Radio & Machine Workers v. RCA Corporation,* 516 F.2d 1336 (3d Cir. 1975), the union argued that arbitration was inappropriate under a section of the contract which provided that the same issue could not be arbitrated more than once. The union claimed that the issue in question had been arbitrated years before. The district court denied the union's request to enjoin the arbitration on the ground that the issue had not been previously arbitrated. The Court of Appeals affirmed but on different grounds. The Court of Appeals held that it was the function of the arbi-

trator and not the court to decide whether the same issue had been previously arbitrated within the meaning of the contract.

The Court of Appeals in *RCA* said:

> . . . the issue before us must follow a very narrow compass: Does a dispute as to the application of the rearbitration provision constitute an arbitrable question under the contract? We hold that it does. 516 F.2d at 1340.

The issue is much the same in the instant case—is a dispute as to the meaning of §22.04 an arbitrable question under the contract. Quite clearly, it is an arbitrable issue which the arbitrator decided in favor of Petitioner.

In *RCA*, the Court concluded:

> . . . it is for the arbitrator to evaluate the relevance and effect of the 1946 arbitration award and opinion; it is for him to decide whether it qualifies 'in industrial common law' through 'experience developed by reason and reason tried and tested by experience', as the 'same question or issue' presented by the immediate grievance which therefore may not 'be the subject of arbitration more than once.' (516 F.2d at 1340-41; footnote omitted.)

The Court of Appeals, having issued no opinion did not explain why this language and this theory espoused in *RCA*, did not apply to the instant case. The arbitrator's special expertise in industrial common law was at the very core of his decision regarding the meaning of §22.04. The district court has no business imposing its own standards of contract construction and rejecting the arbitrator's special expertised judgment.

The Court in *RCA* very easily rejected the union's position that it was for the court to interpret the collective bargaining agreement and rule as a matter of federal law

that the grievance had already been subject to arbitration. The Court of Appeals declined "to allocate this interpretive role to the district courts." 516 F.2d at 1339.

The Court of Appeals and the district court in the instant case utterly ignored these strictures against court interpretation of the meaning of collective bargaining agreements. In *RCA*, the Court of Appeals held it was for the arbitrator to interpret the agreement.

The Court of Appeals in *RCA* relied upon *American Manufacturing* and *Enterprise Wheel, supra*. The Court was not at all troubled by the fact that the provision of the contract to be interpreted by the arbitrator was one which limited arbitration.

In the instant case, the Court of Appeals affirmed the district court opinion which held it was for the court to interpret the agreement and to decide whether the grievances were excluded from arbitration within the meaning of §22.04. Since the issue in both cases was one of interpreting the applicability of a contract provision limiting or excluding certain cases from arbitration, the Court of Appeals decision in the instant case directly conflicts with its decision in *RCA* and with the policy against courts usurping the arbitrator's interpretive function.

The decision of the Court of Appeals in the case *sub judice* is at variance with its own decisions which heretofore have strongly adhered to the letter and policy of this Court's pronouncements regarding the enforcement of labor arbitration awards. If the decision of the Court of Appeals is allowed to stand as a proper statement of the law, it will seriously confuse the previously well established standards to be applied in reviewing arbitration awards. The decision invites courts to inquire into the interpretations of contracts rendered by arbitrators and encourages the courts to replace the interpretations with alternatives favored by the courts.

A party unsuccessful before a labor arbitrator will ask the court to review the arbitrator's reasoning and care-

fully scrutinize his opinion for ambiguities. This Court, in *Enterprise Wheel, supra,* clearly held that such an approach is inappropriate. What this Court said in *Enterprise Wheel* applies four square to the instant case.

> The Court of Appeals' opinion refusing to enforce . . . the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it. 363 U.S. at 598.

The decision of the Court of Appeals substantially alters well-established federal labor law policy and should not be allowed to stand.

C. The decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeals.

In *Bressette v. International Talc Co.*, 527 F.2d 211 (2d Cir. 1975), the Court of Appeals reversed the refusal of the district court to compel arbitration. In that case the company, after going out of business, claimed that the termination of its business terminated its obligations under the labor agreement, including the agreement to arbitrate. The company argued that the question of contract termination was inherently a question of law for the court. The Court of Appeals held that the issue in the case was not whether there was a contract, but, rather what the contract required. The question was one strictly for the arbitrator. The holding in *Bressette* is squarely in conflict with the decision of the Court of Appeals in the instant case.

The following cases from other circuits carefully follow the standards for reviewing arbitration awards as explicated by this Court. These cases emphasize that the role of the court is a narrow one; the arbitrator's interpretation of the contract is binding upon the parties and upon the courts. It is insignificant that the court feels it would

not interpret the contract as did the arbitrator. As long as the award draws its essence from the contract, it must be enforced. If the award is based on any plausible interpretation of the contract in the context of the parties' conduct, judicial inquiry ceases. See *Aloha Motors v. ILWU, Local 142,* — F.2d —, 91 LRRM 2751 (9th Cir. 1976); *IAM v. Modern Air Transport, Inc.*, 495 F.2d 1241 (5th Cir. 1974); *Mogge v. District 8, IAM,* 454 F.2d 510 (7th Cir. 1971); *Holly Sugar Corp. v. Distillery Rectifying, Wine and Allied Workers International Union,* 412 F.2d 899 (9th Cir. 1969); *San Francisco-Oakland Newspaper Guild v. Tribune Publishing Company,* 407 F.2d 1327 (9th Cir. 1969); *Local 7-644, Oil, Chemical and Atomic Workers International Union v. Mobil Oil Company,* 350 F.2d 708 (7th Cir. 1965), *cert. den.*, 382 U.S. 986 (1966).

No other court of appeals has waivered from the strict rule against courts being involved in interpreting the meaning of the terms of a labor agreement. The courts have been unanimous in deferring to interpretations rendered by arbitrators even where they involve the meaning of exclusionary clauses. *International Union of Electrical, Radio and Machine workers v. Peerless Pressed Metal Corp.*, 489 F.2d 768 (1st Cir. 1973); *Safeway Stores v. American Bakery and Confectionery Workers International Union,* 390 F.2d 79 (5th Cir. 1968).

In the instant case, the district court did nothing more than reject what it considered to be the arbitrator's erroneous interpretation of the contract.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-1110 and 76-1111

The Bell Telephone Company of Pennsylvania
v.
Federation of Telephone Workers of Pennsylvania,
Appellant in No. 76-1110
(D.C. Civil Action No. 74-2584)

Federation of Telephone Workers of Pennsylvania,
by I. C. Glendenning, its Trustee ad Litem,
Appellant in No. 76-1111
v.
The Bell Telephone Company of Pennsylvania
(D.C. Civil Action No. 74-2565)

Appeal from the United States District Court for the Eastern District of Pennsylvania

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Argued

October 18, 1976
Before: ALDISERT and GIBBONS, *Circuit Judges*, and MEANOR, *District Judge*.

Judgment Order

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by The Honorable A. Leon Higginbotham, Jr., 406 F. Supp. 1201 (E.D. Pa. 1975), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

at 91 LRRM 2714

By The Court,

Attest:

/s/ .....
Circuit Judge

/s/ .....
Thomas F. Quinn, *Clerk*

Dated: Oct. 19, 1976

Appendix B

[Caption Omitted in Printing]

Sur Petition For Rehearing

Present: Seitz, *Chief Judge*, and Aldisert, Gibbons and Hunter, *Circuit Judges*, and Meanor, *District Judge*.

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ .....
Judge

Dated: November 26, 1976

Judges Van Dusen, Adams, Rosenn, Weis and Garth did not participate in the consideration of this matter.

Appendix C

(1201) Federation of Telephone Workers of Pennsylvania, by I. C. Glendenning, its Trustee ad Litem, *Plaintiff*,

v.

The Bell Telephone Company of Pennsylvania, *Defendant*.
The Bell Telephone Company of Pennsylvania, *Plaintiff*,

v.

Federation of Telephone Workers of Pennsylvania, *Defendant*.

Civ. A. Nos. 74-2565, 74-2584.

United States District Court,
E. D. Pennsylvania.

Nov. 26, 1975.

MEMORANDUM OPINION AND ORDER

INTRODUCTION

HIGGINBOTHAM, *District Judge*.

These consolidated cases come before the Court on cross-motions for summary judgment. In Civil Action No. 74-2565, the Federation of Telephone Workers of Pennsylvania ("the Union") is the moving party, seeking enforcement of an arbitrator's award against the Bell Telephone Company of Pennsylvania ("the Company"). The Company is the moving party in Civil Action No. 74-2584, and seeks to have the same arbitration award set aside. The Company has also cross-moved for summary judgment in Civil Action No. 74-2565. The same facts are material in both cases, they are not in dispute, and both parties concede that the cases are ripe for summary judgment.

After careful consideration of those material facts and of the briefs and memoranda submitted by the parties, I have concluded that neither is en(1203)titled to the full relief they request. Thus, for reasons that will hereinafter appear, their respective motions for summary judgment will be granted in part and denied in part.

Factual Background[1]

The Union and the Company were parties to a collective bargaining agreement dated May 17, 1943, as last amended July 28, 1971 (hereinafter "Agreement").[2] The Agreement provided a grievance and arbitration procedure for the resolution of disputes between the parties. That procedure culminated in the submission of unresolved disputes to an impartial arbitrator selected under the auspices of the American Arbitration Association. Arbitration of disputes, however, was specifically limited to matters made subject to arbitration by the provisions of the Agreement. Agreement, §13.01. The Agreement expressly excluded disputes about the terms of the promotions article, Article 22, from arbitration. Agreement, § 22.04.

On November 15, 1972, the Company, in response to objections by the Equal Employment Opportunity Commission ("EEOC") and other federal agencies to its promotion practices, implemented its Upward Mobility Transfer Plan ("UMTP"). The plan formalized promotion procedures and special selection procedures for the placement of certain employees in job classifications where they had

1. The Union contends in its Motion for Summary Judgment, Doc. # 7 in No. 74-2565, at 1, that the only material facts in these cases are the collective bargaining agreement, the arbitration hearing, and the arbitrator's award. While those facts are undoubtedly material, these cases would scarcely be intelligible without a more extensive factual discussion than the mere recital of those three facts would provide.

2. A copy of the Agreement is attached as Exhibit A to the Union's complaint in Civil Action No. 74-2565.

previously been underutilized. By a letter dated November 29, 1972, the Union demanded that the Company's implementation of the UMTP be submitted to arbitration.

On January 18, 1973, this Court approved a Consent Decree in a suit, Civil Action No. 73-149, brought by the EEOC and other agencies of the federal government, against the American Telephone and Telegraph Company ("AT&T") and the operating companies of the Bell System, including Bell of Pennsylvania (the Company in the instant actions). The suit had charged AT&T and its operating companies with employment discrimination against women and minorities. The Consent Decree required the companies of the Bell system to develop affirmative action programs for the employment of women and minorities and to establish a variety other procedures related to the employment of women and minorities. These requirements were designed to insure the compliance of Bell system companies with applicable federal law, including the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et seq.*, the Fair Labor Standards Act of 1938, as amended, the Equal Pay Act, 29 U.S.C. § 201 *et seq.*, and Executive Order No. 11246, as amended, Revised Order No. 4, 29 C.F.R. §§ 60-2.1 *et seq.*[3]

Part A, §I of the Decree states that AT&T's Model Upgrading and Transfer Plan, incorporated into the Decree as an Appendix, is consistent with Revised Order No. 4 and is a "bona fide seniority or merit system" under §703(h) of Title VII of the Civil Rights Act of 1964. It further states that the adoption and implementation of the plan by the Bell System would constitute compliance with

3. The agreement of the parties is set forth in 1 CCH Emp. Prac. ¶ 1860, at 1533-3 to 1533-14. For a discussion of the background of the Decree, see my opinion in *EEOC v. AT&T Co.*, 365 F.Supp. 1105 (E.D.Pa. 1973). For the subsequent history of Civil Action No. 73-149, see *EEOC v. AT&T Co.*, 506 F.2d 735 (3d Cir. 1974), aff'g in part, remanding in part 365 F.Supp 1105 (E.D.Pa. 1973).

the requirements of Revised Order No. 4 and Title VII. The Company's UMPT in (1204) the instant case is patterned after that model plan and is in compliance with the Decree.

In Part B, § 11, ¶ D, the Decree states that it modifies existing Bell system collective bargaining agreements only to the extent required by federal law, and provides for negotiation, by Bell system companies and the collective bargaining representatives of their employees, of alternatives to its own provisions, so long as the alternatives also comply with federal law.

On July 12, 1973, as part of its original November 29, 1972 case, the Union submitted to arbitration the grievances of eleven employees. The latter claimed that the imposition of the UMTP had either delayed their promotion or denied it altogether.

In a letter dated August 3, 1973, the Company stated its position on the demand for arbitration. It disclaimed any violations of the Agreement and denied the authority of an arbitration board to review its UMTP. While it was willing to present that position to an arbitration board, it said that such a presentation was not a waiver of its objections to the board's authority and jurisdiction over the UMTP. It expressly reserved its right to take legal action in other appropriate forums.

Arbitrator Lewis Gill was selected as impartial chairman of the arbitration board. Arbitration hearings were conducted before him on October 3, 1973, December 10, 1973 and January 10, 1974. On July 22, 1974, Arbitrator Gill rendered an award requiring the Company to make certain changes in its UMTP,[4] and on September 16, 1974, he issued an opinion stating his reasons for the July 22 award.[5]

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4. A copy of the award is annexed to the Union's complaint in No. 74-2565 as Exhibit B.

5. A copy of the opinion appears as Exhibit C to the Union's complaint in No. 74-2565.

In its complaint in No. 74-2565, the Union alleges that the Company has failed to comply with the arbitrator's award in six different respects.[6] In its complaint in No. 74-2584, the Company alleges that Items 1 through 5 in the award require violations of the Consent Decree, that Items 2 through 5 are based on a nonarbitrable provision of the Agreement, and that Item 1 is based on an impermissible addition to the Agreement by the arbitrator. In each of these five items, the Company argues, Arbitrator Gill exceeded his authority and jurisdiction.[7]

Legal Discussion

A. *The Law of Arbitrability*

[1-3] It is well settled that the arbitration of labor disputes is a federally favored policy. 29 U.S.C. § 173(d); *Gateway Coal Company v. United Mine Workers*, 414 U.S. 368, 377, 94 S.Ct. 629, 636, 38 L.Ed.2d 583 (1974); *Controlled Sanitation Corp. v. District 128, International Association of Machinists*, 525 F.2d 1324, at 1328 (3d Cir. 1975). The threshold question of arbitrability, however, is a matter for judicial determination. *International Union of Operating Engineers, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487, 491, 92 S.Ct. 1710, 1713, 32 L.Ed.2d 248 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547, 84 S.Ct. 909, 913, 11 L.Ed.2d 898 (1964); *Atkinson v. Sinclair Refining Company*, 370 U.S. 238, 241, 82

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6. An additional failure in compliance is alleged in the Union's motion for summary judgment in No. 74-2565, Doc. # 7 at 3.

7. In its cross-motion for summary judgment in No. 74-2565, the Company further alleges that the arbitrator exceeded his authority in Item 6 of the award and that it is already in compliance with Items 1, 2, 3, 6 and 9 of the award. The same cross-motion contains no allegation that Item 1 of the award violates the consent Decree, and the Company may well have abandoned that claim. In light of my decision on Item 1 under the Agreement, I need not, and do not, reach that question.

S.Ct. 1318, 8 L.Ed.2d 462 (1962); see *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).[8] Since arbi(1205)tration is a matter of contract, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior and Gulf, supra*, 363 U.S. at 582, 80 S.Ct. at 1353; see *John Wiley & Sons, Inc., supra*, 376 U.S. at 547, 84 S.Ct. 909. Thus, an employer and a union can agree to exclude certain issues or disputes from the arbitration procedures of their collective bargaining agreement. *Atkinson, supra*, 370 U.S. at 241-42, 82 S.Ct. 1318; *Warrior and Gulf, supra* at 584-85. If there is doubt about whether the parties have agreed to submit a dispute to arbitration, those doubts should be resolved in favor of arbitration. *Warrior and Gulf, supra*, 363 U.S. at 583, 80 S.Ct. 1347. If, however, "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," id. at 582-83, 80 S.Ct. at 1353, and if the collective bargaining agreement contains an "express provision excluding a particular grievance from arbitration," id. at 485, 80 S.Ct. at 1354, then the particular dispute or grievance is non-arbitrable. Should enforcement be sought for an arbitrator's award based upon a non-arbitrable provision of a collective bargaining agreement, enforcement must be denied. See *Enterprise Wheel and Car Corp., supra*, 363 U.S. at 597, 80 S.Ct. 1358.

B. *The New York Telephone Company Case*

[4] The Court of Appeals for the Second Circuit applied many of these principles in *Communications Work-*

8. The Steelworkers Trilogy, of which the Warrior and Gulf case is part, is the most authoritative Supreme Court statement of the national policy favoring arbitration of labor disputes. See also *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) and *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960).

ers of America v. New York Telephone Company, 327 F.2d 94 (2d Cir. 1964), a case remarkably similar to the instant action. The district court had granted the defendant's motion for summary judgment and dismissed plaintiff union's action to compel the arbitration of temporary promotions. The Court of Appeals affirmed.[9]

The collective bargaining agreement in the CWA case excluded disputes over promotions from arbitration, contained a general arbitration clause "regarding the true intent and meaning" of the agreement, and limited arbitration to matters specifically made subject to arbitration. It thus parallels the Agreement in the instant case. See §§ 22.04, 10.06 and 13.01 respectively. Plaintiff union in the *CWA* case also made the same argument that the Union makes in the instant case, [10] namely, that the exclusion from arbitration applied to individual promotion disputes alone and not to broader disputes over promotion policy generally. The Second Circuit rejected that argument, reasoning that the exclusionary clause of the contract, which prohibited arbitration of *any* dispute over the terms of the promotions article, would be meaningless if it did not also limit the scope of the general arbitration clause regarding the "true intent and meaning" of the agreement. 327 F.2d at 96-97.

The same rationale applies with equal force in the instant case. Section 22 of the Agreement does not make promotion disputes specifically subject to arbitration as required by § 13.01. Indeed, it specifically excludes them

9. The Union's Reply Memorandum, Doc. # 13, at 14-15 has attempted, unpersuasively, to distinguish the *CWA* case. While it was an action to compel arbitration, not an enforcement proceeding, the issues presented, the arguments made by the parties and the collective bargaining agreement there all significantly resemble their counterparts in this case.

10. Arbitrator Gill in fact accepted this argument.

from arbitration.[11] To embrace the argument ad(1206)-vanced by the Union, and erroneously accepted by the arbitrator, would be to locate the arbitrator's authority in the "true intent and meaning" language of § 10.06, and thus render § 22.04 meaningless. There can be no doubt that an arbitrator's discretion is broad and entitled to judicial deference. But there comes a point where the cloak of his office will not suffice to conceal utter absurdities in his award, especially when those absurdities are bereft of logic, contractual intent and legal authority. Absurdities in contract construction are not favored by the courts. Enforcement of the arbitrator's award, in so far as it is based on Article 22 of the Agreement, must be denied.

C. *Items 2 Through 5 of the Award*

[5] In his opinion, Arbitrator Gill discusses seven items where he directed the Company to take remedial action. With regard to items 2 through 5, he states (Opinion at 5-6):

> Probably the most important are numbers 2, 3, 4 and 5, since those items deal with new policies under which some employees are totally and automatically eliminated from consideration for promotions or other vacancies, whereas before under the same conditions they were not. The provisions in the Award on these subjects (application rules, attendance, time in title, and job freeze) speak for themselves, in effect stating that the new policies in these areas are not required

11. In the *CWA* case, the Second Circuit construed a contract provision substantially similar to the clause barring arbitration in the instant case and said: "[i]t is difficult to imagine a clearer or more direct exclusionary clause. . . ." 327 F.2d at 96. That language accurately describes § 22.04 of the instant Agreement. Its clarity and directness are incontestable.

by the Decree and shall be set aside in favor of the previous policy of flexibility as to these factors. The rulings reflect my conclusion that it is violative of the contract provision on promotions (Article 22) for the Company to unilaterally disqualify employees from consideration under the standards set forth in that Article, and that since those changes are not required for compliance with the Decree, they should be discontinued.

Probably two comments are in order as to this conclusion. One is that the Company has a very respectable argument that even this general conclusion amounts to ruling on a "dispute between the Union and the Company involving the terms of this Article" (Article 22), which is not supposed to be "subject to arbitration." However, I am persuaded by the Union's contention that the "true meaning and intent" of that provision in Article 22 is simply to rule out arbitration of individual grievances claiming improper denial of promotions under that Article, not to render unilateral changes in the general policy immune for review. . . .

Items 2, 3, 4 and 5 of the arbitrator's award are therefore clearly based on what the arbitrator found to be violations of Section 22 of the collective bargaining agreement. Claims under Section 22, however, are specifically excluded from the arbitrator's jurisdiction. In a word, such claims are nonarbitrable. Thus, because the arbitrator, in Items 2, 3, 4 and 5, made decisions that he lacked the jurisdiction and authority to make, I am compelled to set aside those specific items of the award.

I am well aware that "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." *Enterprise Wheel and Car Corp., supra*, 363 U.S. at 598, 80 S.Ct. at

1361. There is, however, no ambiguity in arbitrator Gill's opinion as to Items 2, 3, 4 and 5. He stated flatly that the procedures challenged by the Union in those items were "violative of the contract provision on promotions (Article 22)." Exhibit C to the Union's complaint in No. 74-2565, at 6.

The Union relies primarily on *Ludwig Honold Manufacturing Company v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969). The citation proved less than helpful in resolving the dispute over Items 2 through 5 of the award. Judge Aldisert, writing for the panel in *Honold*, specifically stated that the case did not involve **(1207)** the issue or arbitrability. 405 F.2d at 1125.

The Company argues that Part C, Items 2 through 5 of the arbitration award should be vacated because they conflict (1) with the Consent Decree approved by this Court in No. 73-149, and (2) with the Company's equal employment obligations under federal law. In view of my decision that Items 2 through 5 of the Award must be set aside because Arbitrator Gill exceeded his authority under the Agreement, I need not, and do not, reach either of these federal law grounds for vacating those items in the award.

D. *Item 1 of the Award*

In Item 1 of the award, Arbitrator Gill required the Company and the Union to "negotiate to set up appropriate procedures" that would give the Union's representatives "direct access to the Placement Bureau to discuss grievances regarding actions taken by that Bureau." Explaining this item, Arbitrator Gill said (Opinion at 7):

> As to number 1, dealing with the newly created Placement Bureau, that involves the Company's obligation (expressly affirmed in a Letter Agreement of May 14, 1968) to "give the Union the reasons for the selection

> and the reasons why the unsuccessful applicant was not selected as the basis for discussing the grievance." I think it is a fair implementation of that understanding to arrange for the Union to have direct access to the Placement Bureau in grievances regarding actions taken by that Bureau.

The letter agreement referred to in the Opinion, however, is a summary of a "discussion regarding the meaning of Article 22, Promotions" between the Company and the Union. Agreement, "Letter Agreements," at 8. The letter agreement in question is thus an agreed interpretation of the terms of Article 22, and disputes over the meaning of that article have been specifically from arbitration. Agreement, § 22.04. Item 1 of the award therefore labors under the same deficiency that I have previously found to afflict Items 2 through 5; it is based on a non-arbitrable provision of the Agreement. When, as here, an arbitrator's award does not draw "its essence from the collective bargaining agreement. . . . courts have no choice but to refuse enforcement of the award." *Enterprise Wheel and Car Corp., supra*, 363 U.S. at 597, 80 S.Ct. at 1361.[12]

E. *Item 6 of the Award*

> "6. *Temporary demotions.* The change from the previous practice of permitting employees to return automatically to their prior jobs on completion of the temporary demotion, is not required by the decree; the previous practice shall be restored."

[6] In his opinion, Arbitrator Gill says only that this item is "relatively minor and self-explanatory." Opinion at 7. The Company contends that "a return to a former higher

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12. I need not, and do not, reach the Company's further argument that Item 1 constitutes an unauthorized addition to the Agreement by the arbitrator.

job from a demotion is a *promotion*" and is therefore non-arbitrable under § 22.04 of the Agreement. Company Memorandum, Doc. # 10, at 20 (emphasis in original). The Union does not respond specifically to this argument, urging instead that the Court generally enforce all of the disputed items in the award under the authority of the *Honold* case. *Honold* is, of course, again distinguishable, since the court there expressly stated that the issue of arbitrability was not before it. There is then *no* judicial authority for the Union's position that Item 6 involves a dispute that is arbitrable under the Agreement. Moreover, in my view it would be doing violence to the English language to interpret the return of an employee to a former higher-rated job as anything other than a promotion. The foregoing discussion of Items 1 through (1208) 5 demonstrates the non-arbitrable character of disputes over promotions. Accordingly, enforcement of Item 6 of the award must also be denied.[13]

F. *Item 9 of the Award*

[7] The final disputed item in the award is Item 9. Arbitrator Gill described it too as "relatively minor and self-explanatory." Opinion at 7. It reads as follows:

> "9. Payment of expenses. There has assertedly been a change in the prior practice of payment of expenses as called for in A6.051 of the contract. No such change is required by the decree, and we direct that the previous practice be followed."[14]

13. This conclusion draws further support from the opinion of Arbitrator James C. Hill, in AAA Case No. 14 30 0565 73, decided June 21, 1974. There, Arbitrator Hill, in a dispute between the same two parties, held disputes over demotions to be non-arbitrable. His opinion appears as Exhibit A to the affidavit of R. E. Young in support of the Company's Cross Motion for Summary Judgment, Doc. # 9, filed April 21, 1975.

14. Section A6.051 is part of § A6.05 of the Agreement, which is titled "Employees Permanently Transferred from one Payroll Location to Another."

The Company says there has been no such change, and submits that it is in compliance with the award. The Union rightly points out that, "if such is the case, then the Company should not find that enforcement of the arbitration award with respect to the payment of expenses will prove any hardship to it." Union Reply Memorandum, Doc. # 13, at 23. Accordingly, enforcement of Item 9 of the award will be ordered.

Conclusion

For reasons set forth in the foregoing sections of this opinion, it is apparent that neither party is entitled to the full relief it seeks. By basing certain items in his award on non-arbitrable provisions of the Agreement, Arbitrator Gill exceeded his authority under that Agreement. Those items in his award must therefore be set aside, and their enforcement denied. As to the only other disputed item in the award, however, the Union is entitled to an order of enforcement. Accordingly, in Civil Action No. 74-2565, the Union's motion for summary judgment is granted as to Item 9, and is denied as to Items 1 through 6. The Company's cross motion for summary judgment in that action and its own motion from summary judgment in Civil Action No. 75-2584 are granted as to Items 1 through 6, and are denied as to Item 9. An appropriate order will be entered.

This opinion shall constitute the Court's findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

Appendix D

* * *

[Caption Omitted in Printing]

Award of Arbitrator

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated July 28, 1971 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

A. The following items in the Upward Mobility Transfer Plan (UMTP) are found to be required for compliance with the Consent Decree and Order of the District Court dated January 18, 1973:

1. The provisions for utilizing a broader pool than the bargaining unit.
2. The quotas and goals established and approved by the OFCC pursuant to Part A (II) of the decree.
3. The provisions for utilizing overrides when necessary to meet the established quotas and goals.

B. As to the items just listed in A (2) and (3), the Company is directed to engage, upon request, in further negotiations with the Union concerning possible changes in the quotas and goals and override procedures, with any such changes to be subject to approval by the OFCC, in accordance with Part A (II) of the decree. During the pendency of these negotiations, the present quotas and goals shall remain in effect, and the Company shall be free to utilize the override procedures to the extent necessary to meet them.

State of
County of ss.:

On this day of , 19 , before me personally came and appeared to be known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

To facilitate these negotiations, the Company shall provide to the Union, upon request, all relevant information as to the quotas and goals, including timetables and any other data pertinent to the operation of the override procedures.

C. The following items in the UMTP are found to be wholly or partially not required by the decree; the action to be taken is indicated in each case:

1. *Placement Bureau.* While this is not required by the decree, we find that it does not violate the contract so long as the Union representatives have direct access to the Placement Bureau to discuss grievances regarding actions taken by that Bureau. The parties shall negotiate to set up appropriate procedures for such access.
2. *Application Rules.* We find that some application rules are reasonably required by the decree, to implement the "opportunity to compete" mandated by the decree, but that the limitation of two applications at any one time is not required by the decree. The present procedures for applications may be retained, but the limitation of two at any one time shall be set aside. Pending negotiations for some agreed limitation, no limitation shall be in effect.
3. *Attendance.* Consideration of attendance records is not violative of the contract, but the new policy of automatic disqualification of applicants for failure to meet certain absolute standards of attendance is not required by the decree and is violative of Article 22.01, which simply provides that attend-

ance record is one of the several factors to be considered. The policy of automatic disqualification shall be set aside.

4. *Time in title.* The fixed time in title requirements in UMTP are not required by the decree, which only specifies *upper limits* for such requirements. The fixed requirements shall be set aside, and the previous practice of flexibility as to time in title requirements shall be followed, subject only to the upper limits specified in the decree.

5. *Job freeze.* The freeze provisions in the UMTP are likewise not required by the decree, and they too shall be set aside in favor of the previous practice of flexibility.

6. *Temporary demotions.* The change from the previous practice of permitting employees to return automatically to their prior jobs on completion of the temporary demotion, is not required by the decree; the previous practice shall be restored.

7. *Probationary periods.* While these are not required by the decree, we find no essential change from the previous practice, and will direct no remedial action.

8. *Weights.* As in the last item, we find no essential change to have been made in the prior practice, and no action will be directed on this subject.

9. *Payment of expenses.* There has assertedly been a change in the prior practice of payment of expenses as called for in A6.051 of the contract. No such change is required by the decree, and we direct that the previous practices be followed.

10. *Performance.* We find no essential change to have been made in the practice as to considering this factor, and will direct no action as to this subject.

11. *Disability.* Here again we find no essential change to have been made in the previous practice, and will direct no action as to this subject.

D. *Individual grievances regarding promotions.* The Union has requested that we direct remedial action in a number of individual cases where promotions have been denied because of application of UMTP provisions which have been found to be improper (such as Time in Title or Attendance requirements). However, we find that under Article 22.04 of the contract, we have no authority to arbitrate individual promotion grievances. Those grievances are referred back to the parties for further handling in the grievance procedure, short of arbitration, in the light of this decision.

Arbitration Board

/s/
Lewis M. Gill, Chairman

/s/
William E. Wallace, Union Member
Concurring except for C7, 10, 11

/s/
Theodore Caldwell, Company Member
(Dissenting Opinion attached.)

July 22, 1974

Opinion of T. J. Caldwell, Company Arbitrator (UMTP)

I agree with the Chairman that Items 1 through 3 in Part A of this Award are required for compliance with the Consent Decree and Order of the District Court dated January 18, 1973.

I do not agree with the Chairman's Finding that all of the items in Part C of the Award are, in whole or in part, not required by the Consent Decree. I believe that the Company's procedures under UMTP are required by the Consent Decree subject to bargaining and agreement

with the Union on alternative procedures which would meet the requirements of Federal law. The Company has bargained and will continue to bargain in good faith with the Union with regard to changes in UMTP which comply with the law. To the extent that the Chairman's Award requires changes in UMTP provisions, I believe that it is contrary to the Consent Decree and exceeds his authority.

I also believe that the Chairman's rulings with respect to Part C, Items 1, 2, 3, 4 and 5 exceed his authority under the parties' Agreement. As the Chairman's opinion makes clear, the rulings on Items 2 through 5 rest upon his interpretation of Article 22, Promotions, of the Agreement. Section 22.04 of Article 22 states:

> "It is understood that any dispute between the Union and the Company involving the terms of this Article may be grieved but shall not be subject to arbitration."

With regard to the Chairman's finding in Part C, Item 1, that Union representatives have a contractual right to direct access to the Placement Bureau to discuss grievances, I do not believe that the Letter Agreement of May 14, 1968 in any way supports the ruling. In his opinion the Chairman states that he thinks that his ruling "is a fair implementation" of the Letter Agreement. He does not find, nor can the May 14, 1968 Letter Agreement be reasonably interpreted to state, that direct access to the Placement Bureau is a *requirement* of the Letter Agreement. The Chairman, in my opinion, has *added* a contractual requirement in violation of Section 13.02 and has, therefore, exceeded his authority in Item C1, of the Award.

All of the foregoing notwithstanding, the Company has bargained and is prepared to continue to bargain with the Union with regard to the provisions of UMTP. The Company sincerely believes that agreement can be reached on all of the disputed items.

T. J. CALDWELL
Personnel Supervisor
Working Conditions

Appendix E

FEDERATION OF TELEPHONE WORKERS OF PA.
AND
BELL TELEPHONE COMPANY OF PENNSYLVANIA

Arbitration
Case Number:
14 30 0961 72 M/G

Opinion

This Opinion sets forth the reasons of the Chairman of the Arbitration Board for the various conclusions embodied in an Award dated July 22, 1974. The Award was issued following several hearings, the filing of post-hearing briefs, and two executive sessions of the Board. In the interest of expedition, the parties agreed to the issuance of the Award at that time with the explanatory Opinion to be prepared later.

As indicated underneath their signatures on the Award, the Union and Company members of the Board have each dissented from certain portions of the Award and concurred in others. No effort will be made in this Opinion to state the reasons for their concurrence or dissent; this Opinion purports only to state the position of the Chairman.

The lengthy background of the dispute, and the contentions of the parties on the various issues, are of course well known to the parties and will not be set forth here in any detail.

The Union has challenged approximately 14 different items in the Upward Mobility Transfer Plan (UMTP) — the number could be larger or smaller depending on how broadly or narrowly the issues are dealt with — and has also sought to have the Board rule on a number of individual grievances regarding denial of promotions. My basic approach to the decision was first to determine which of

the disputed items were *required* for compliance with the January 18, 1973 Consent Decree and Order of the District Court, then to determine what remedial action, if any, was appropriate as to items found *not* to be so required, and finally to deal with the Union's request for rulings on the individual promotion grievances.

The last-mentioned matter is the easiest to explain, and will be disposed of quickly at the outset. Article 22.04 of the contract provides, in language which I view as free from any ambiguity in this respect, that "any dispute between the Union and the Company involving the terms of this Article may be grieved but *shall not be subject to arbitration*" (underscoring mine). The Article sets forth various factors which will be considered in making promotions, and the Union argues that a unilateral change in the weighting of those factors, or disregard of any of them, is violative of the contract and should permit remedial action in arbitration for employees thereby disadvantaged. I agree with the first part of that argument — that such unilateral changes violate the contract — but not the last part; I think the underscored language quoted above plainly rules out *arbitration* of any individual claims under this Article. I am well aware of the fact that this could leave the grievants without any effective remedy, but that is the way the contract reads and we are of course without authority to change it.

Turning now to the initial question of which items were and are required for compliance with the Decree, the Award provided that three of the basic items in dispute fell into that category, describing them as follows:

"1. The provisions for utilizing a broader pool than the bargaining unit.
2. The quotas and goals established and approved by the OFCC pursuant to Part A (II) of the decree.
3. The provisions for utilizing overrides when necessary to meet the established quotas and goals."

I think little need be said as to the reasons for concluding that these items are required for compliance with the decree. The Union essentially has not denied that the broader pool is necessary for compliance, or that quotas and goals are required, or that overrides are necessary to some extent. The principal argument in these areas has concerned the provision in Part A (II) of the Decree, which permits the negotiation of alternative provisions "which would also be in compliance with Federal law." The Company, in turn, does not deny that it is obligated to negotiate in good faith concerning such possible alternatives. Though it contends that it has already done so, it also expresses a willingness to negotiate further if the Union so desires. The critical question here is *what status quo* shall be in effect pending the negotiation of any changes and their necessary approval by the OFCC.

The Award provides that "during the pendency of these negotiations, the present quotas and goals shall remain in effect, and the Company shall be free to utilize the override procedures to the extent necessary to meet them." This determination is based primarily on practical rather than legalistic grounds. As a realistic matter, in light of the history of this dispute, it is likely to be a considerable period of time (if ever) before any agreement is reached, and approved, for alternative quotas and goals and override procedures. To delay the introduction of *any* such programs in the meantime strikes me as wholly impracticable. And it is also probably illegal, in the sense that I doubt very much that the Court would approve any lengthy and indefinite delay of that sort. (It should perhaps be mentioned that nothing is said in the Award about negotiating a change in the provision for using a broader pool than the bargaining unit; that is a deliberate omission, since I do not believe the Decree could be interpreted as permitting a limitation of the pool to the bargaining unit.)

The accompanying requirement in the Award that the Company provide the Union, upon request, with all the

relevant information on quotas, goals, and override procedures, appears to be self-explanatory and not to call for elaboration here.

That brings us to the 11 items which were found to be "wholly or partially not required by the decree." One general comment is in order as to all of these items. The Company has made a sweeping contention that *everything* in the UMTP is required for compliance with the Decree, on the ground that the Decree incorporates the Plan as an Appendix. I do not buy that broad contention; as I read the Decree, it simply provides that the model Plan, or UMTP, is *an example* of what will constitute compliance with the Decree. The Decree goes on to provide explicitly that alternative plans may *also* constitute such compliance, and I think that rules out a contention that each and every item of the model Plan must be followed in order to comply with the Decree. And it is quite apparent, upon analyzing the particular disputed items, that a number of them are not essential, and in some cases not even relevant, to carrying out the basic purposes of the Decree.

Once it is determined that a particular item is not required for compliance with the Decree, the next question is whether it is violative of the contract. If it is, there remains the question of what remedial action to take.

As to four of the 11 items found wholly or partially not required by the Decree — numbers 7, 8, 10 and 11 in the Award — I have concluded that the Company's actions under UMTP represent no essential change from the previous practice under the contract, and hence present no contract violation. No remedial action is directed as to those items, and I think no further comment is needed as to them.

That leaves seven items where remedial action *has* been directed. Probably the most important are numbers 2, 3, 4 and 5, since those items deal with new policies under which some employees are totally and automatically

eliminated from consideration for promotions or other vacancies, whereas before under the same conditions they were not. The provisions in the Award on these subjects (application rules, attendance, time in title, and job freeze) speak for themselves, in effect stating that the new policies in these areas are not required by the Decree and shall be set aside in favor of the previous policy of flexibility as to these factors. The rulings reflect my conclusion that it is violative of the contract provision on promotions (Article 22) for the Company to unilaterally disqualify employees from consideration under the standards set forth in that Article, and that since those changes are not required for compliance with the Decree, they should be discontinued.

Probably two comments are in order as to this conclusion. One is that the Company has a very respectable argument that even this general conclusion amounts to ruling on a "dispute between the Union and the Company involving the terms of this Article" (Article 22), which is not supposed to be "subject to arbitration." However, I am persuaded by the Union's contention that the "true meaning and intent" of that provision in Article 22 is simply to rule out arbitration of individual grievances claiming improper denial of promotions under that Article, not to render unilateral changes in the general policy immune from review. The other comment is that as a practical matter, I recognize that these rulings may not ultimately guarantee aggrieved employees any effective relief, since their individual claims have been found to be non-arbitrable in this same Award.

This leaves for comment only three other items in the Award — numbers 1, 6 and 9. Numbers 6 and 9 are relatively minor and self-explanatory. As to number 1, dealing with the newly-created Placement Bureau, that involves the Company's obligation (expressly affirmed in a Letter Agreement of May 14, 1968) to "give the Union the reasons for the selection and the reasons why the unsuccessful applicant was not selected as the basis for dis-

cussing the grievance." I think it is a fair implementation of that understanding to arrange for the Union to have direct access to the Placement Bureau in grievances regarding actions taken by that Bureau.

/s/ LEWIS M. GILL

Lewis M. Gill, *Chairman*

September 16, 1974

Appendix F

* * *

ARTICLE 10

Grievances

10.01 Any complaint or dispute arising between any employee and the Company shall be presented by the employee or by a Representative of the Union to the immediate supervisor of the employee in an effort to reach a mutually acceptable adjustment.

10.011 Grievances must be presented within thirty days from the time the employee has knowledge of the act which is the basis of the disagreement. The immediate supervisor shall answer the grievance within three working days after it is presented.

10.012 If the matter is not satisfactorily adjusted under Section 10.011, the Union shall present the grievance to the District level supervisor within five working days after the answer is given under Section 10.011. The Company's answer must be given within five working days after the presentation of the grievance to the District level supervisor.

10.013 If the matter is not satisfactorily adjusted under Section 10.012, the Union shall present the grievance to the Division level supervisor within five working days after the answer is given under Section 10.012. The Company's answer must be given within five working days after the presentation of the grievance to the Division level supervisor.

10.02 If any grievance is not satisfactorily adjusted under the provisions of Section 10.01, it shall be submitted to the General Personnel Manager of the Area concerned. When submitted, it shall be processed as follows:

10.021 The grievance must be submitted within seven working days of the date of the answer under Section 10.013.

10.022 The Union shall furnish a written statement of the grievance to the General Personnel Manager. The statement shall contain all pertinent information, including the circumstances giving rise to the grievance, places, times, dates, names of employees involved and the Section of the Contract alleged to be violated, if any. The Union statement shall be presented to the General Personnel Manager when the grievance is submitted to him.

10.023 The General Personnel Manager shall meet with the Union within five working days after the submission of the grievance to him.

10.024 The General Personnel Manager after meeting with the Union shall state his position within three working days after the meeting.

10.03 If any grievance is not satisfactorily adjusted by the General Personnel Manager having authority over the matter, it may then be submitted to the Vice President and General Manager of the Area involved, whose decision shall be final. The claim must be presented no later than thirty days after the General Personnel Manager has given his answer under Sub-Section 10.024 and the Vice President and General Manager must act within ten working days from the date the case is presented to him. This section may be terminated at any time by either the Company or the Union upon 60 days' written notice.

10.04 Controversies of a general nature involving solely matters of contract or policy interpretation obviously not under the jurisdiction of a particular management level may be initiated in accordance

with Sections 10.01 or 10.02 at the level having jurisdiction in the matter. This section may be terminated at any time by either the Company or the Union upon sixty days' written notice.

10.05 The Company may initiate grievances with the appropriate Local President or Division President of the Union. Time limits and procedures shall be the same as those set forth in Sections 10.01 and 10.02 for comparable levels.

10.06 If, at any time, a controversy should arise between the Union and the Company regarding the true intent and meaning of any provision of this Agreement or regarding any claim that either party has not performed a commitment of this Agreement, the controversy may be presented for review in accordance with the preceding Sections of this Article. If the controversy is processed and is not satisfactorily settled under these Sections, the Union or the Company, by written notice specifying the Section of the Agreement alleged to the violated, may request a meeting between representatives of the Union and the Company in an effort to reach a mutually acceptable adjustment of the disputed matter. Notice must be given no later than fifteen days after the answer has been given at the Area level. A meeting will be held as promptly as possible and, in any case, within ten days from the date that it was requested unless a different date is mutually agreed to. If the controversy is not adjusted to the mutual satisfaction of the Union and the Company at such meeting, either party, no later than fifteen days from the end of such meeting, may submit the question under dispute to arbitration in accordance with the provisions of Article 13 of this Agreement.

10.07 Grievances and controversies shall be settled only in accordance with the procedures set forth herein.

In a particular case, the parties may agree to eliminate any steps in the procedure or change any time limits in this Article. If any step under this Article is not taken within the time limits specified, unless such an Agreement has been made or the delay is caused by the Company, the grievance or controversy shall be considered settled. Upon request of either party, agreed settlements of grievances at the Division level or higher shall be reduced to writing. If a joint statement is not obtained, each party shall reduce the settlement to writing and give it to the other party. The parties agree to inform their respective representatives and supervisors, involved in the administration of the agreement, of grievance settlements. It is further agreed that joint statements shall be distributed by the Company to its supervisors and by the Union to its representatives.

10.08 The number of employees of the Company (i.e., the aggrieved employee or employees and representative or representatives of the Union) who shall be paid for joint conference time as provided under Section A4.13 or A13.03 of this Agreement, shall not be more than three when attending meetings at the first level. When multiple grievances involving more than one representative or grievant are to be discussed at a single joint conference at District level or above, the maximum number of employees of the Company who shall be paid for joint conference time shall be increased to five.

10.09 Nothing in this Agreement shall, in any manner, affect the right of an individual employee or group of employees to present grievances to the Company under Section 10.01 nor affect the rights of the Union under the National Labor Relations Act as amended. The Company agrees, however, that after

a grievance arising under any provision of this Agreement has been referred to a Union Representative and such Representative has dealt with a Company Representative with respect thereto, no Company Representative will adjust or attempt to adjust the grievance with the employee or employees involved unless a Union Representative is first given an opportunity to be present at the adjustment.

* * *

ARTICLE 13

Arbitration

13.01 There shall be arbitrated only the matters specifically made subject to arbitration by the provisions of this Agreement.

13.02 The procedure for arbitration is set forth in Exhibit B attached to and made a part of this Agreement. In making an award the Arbitration Board may not add to, subtract from, modify or disregard any contract provision. In no way shall this detract from the right of the Arbitration Board to interpret the meaning and application of any contract term in which the parties hereto are in dispute as to such meaning and application.

* * *

ARTICLE 22

Promotions

22.01 The Company will consider many factors including seniority, job performance, health, attendance record and experience in determining employees' qualifications for promotion within the bargaining unit.

22.02 The Union may call to the Company's attention particular employees whose seniority it believes warrants recognition. The Company will give con-

sideration to such employees, along with others, provided the individual employee so wishes.

22.03 The employee's Supervisor, if requested by an unsuccessful aspirant to a job, will inform such employee of the reasons for the selection and review with him his own status.

22.04 It is understood that any dispute between the Union and the Company involving the terms of this Article may be grieved but shall not be subject to arbitration.

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1174

FEDERATION OF TELEPHONE WORKERS
OF PENNSYLVANIA, *Petitioner*

v.

THE BELL TELEPHONE COMPANY
OF PENNSYLVANIA, *Respondent*

THE BELL TELEPHONE COMPANY
OF PENNSYLVANIA, *Respondent*

v.

FEDERATION OF TELEPHONE WORKERS
OF PENNSYLVANIA, *Petitioner*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases: Page

REASONS FOR DENYING WRIT OF CERTIORARI

The Decision of the Court of Appeals Does Not Present Any Conflict With the Principles Laid Down by this Court in the Steelworkers Trilogy.

The decision sought to be appealed is a Judgment Order of the Court of Appeals for the Third Circuit affirming the judgment of the district court setting aside and denying enforcement of six items of a labor arbitration award (A15), "for the reasons set forth in the district court opinion by The Honorable A. Leon Higginbotham, Jr., 406 F.Supp. 1201 (E.D.Pa. 1975)" (A1).[1]

Judge Higginbotham's Memorandum Opinion and Order is set forth as Appendix C to the Petition for Certiorari. The district court Opinion sets forth the applicable law as follows (A7-A8):

> "It is well settled that the arbitration of labor disputes is a federally favored policy. 29 U.S.C. § 173(d); *Gateway Coal Company v. United Mine Workers*, 414 U.S. 368, 377, 94 S.Ct. 629, 636, 38 L.Ed.2d 583 (1974); *Controlled Sanitation Corp. v. District 128, International Association of Machinists*, 525 F.2d 1324, at 1328 (3d Cir. 1975). The threshold question of arbitrability, however, is a matter for judicial determination. *International Union of Operating Engineers, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487, 491, 92 S.Ct. 1710, 1713, 32 L.Ed. 2d 248 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547, 84 S.Ct. 909, 913, 11 L.Ed.2d 898 (1964); *Atkinson v. Sinclair Refining Company*, 370 U.S. 238, 241, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962); see *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409

1. References to A1, etc., refer to pages of the Appendices contained in the Petition for Certiorari

(1960).[8] Since arbitration is a matter of contract, 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' *Warrior and Gulf, supra,* 363 U.S. at 582, 80 S.Ct. at 1353; see *John Wiley & Sons, Inc., supra,* 376 U.S. 547, 84 S.Ct. 909. Thus, an employer and a union can agree to exclude certain issues or disputes from the arbitration procedures of their collective bargaining agreement. *Atkinson, supra,* 370 U.S. at 241-42, 82 S.Ct. 1318; *Warrior and Gulf, supra* at 584-85. If there is doubt about whether the parties have agreed to submit a dispute to arbitration, those doubts should be resolved in favor of arbitration. *Warrior and Gulf, supra,* 363 U.S. at 583, 80 S.Ct. 1347. If, however, 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute,' id. at 582-83, 80 S.Ct. at 1353, and if the collective bargaining agreement contains an 'express provision excluding a particular grievance from arbitration,' id. at 485, 80 S.Ct. at 1354, then the particular dispute or grievance is non-arbitrable. Should enforcement be sought for an arbitrator's award based upon a non-arbitrable provision of a collective bargaining agreement, enforcement must be denied. See *Enterprise Wheel and Car Corp., supra,* 363 U.S. at 597, 80 S.Ct. 1358.

"8. The Steelworkers Trilogy, of which the Warrior and Gulf case is part, is the most authoritative Supreme Court statement of the national policy favoring arbitration of labor disputes. See also *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) and *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960)."

Applying these well-established principles to the instant case, the district court concluded that the arbitrator exceeded his authority by basing certain items of his award on Article 22 of the parties' labor agreement which Article contained an express exclusion from arbitration of ". . . any dispute between the Union and the Company involving the terms of this Article . . ." (A15, 32).

Petitioner (hereinafter "Union") claims that the decision below conflicts with the principles laid down by this court in the Steelworkers Trilogy cases.[2] The Union reiterates the judicial policy of deference to arbitration and reluctance of the courts to become involved with questions of contract interpretation and objects to the fact that the district court in reaching its conclusion that the arbitrator exceeded his authority, interpreted and applied the exclusionary clause of the labor agreement. It fails, however, to point out that the reluctance to interpret the labor contract is with regard to questions going to the merits of a dispute and not with regard to the extent of the promise to arbitrate. It ignores two major principles of the Trilogy decisions. One, is that an arbitrator's authority may not contravene or extend beyond that conveyed in the labor agreement. The second is that the question of whether the arbitrator has exceeded his authority under the labor agreement is to be determined by the court. This Court stated in *Warrior, supra,* 363 U.S. at 582:

> "The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required

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2. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. . . ."

And in the *Enterprise* case, 363 U.S. at 597:

". . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) this Court upheld the lower courts' refusals to stay an employer's damage suit against a union. It rejected the union contention that the company was bound to arbitrate its claim under the applicable labor agreement. This Court stated at 241:

". . . Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is *a matter to be determined by the Court on the basis of the contract entered into by the parties*. . . ." (Emphasis added)

In the *Atkinson* case, this Court interpreted the provisions of the labor agreement in issue and concluded at 370 U.S. 241-242:

"While it is quite obvious from other provisions of the contract that the parties did not intend to commit all of their possible disputes and the whole scope of their relationship to the grievance and arbitration procedures established in Article XXVI, that article itself is determinative of the issue in this case since it precludes arbitration boards from considering any matters other than employee grievances. . . ."

Following the lead of this Court in the Steelworkers Trilogy and the *Atkinson* case, the federal courts have consistently applied the principle that an arbitrator's authority is limited to that conveyed by the labor agreement and have necessarily interpreted labor agreements in doing so. The Third Circuit in *Affiliated Food Distributors, Inc. v. Teamsters Local 229*, 483 F.2d 418, 420 (3d Cir. 1973), *cert. denied*, 415 U.S. 916 (1974) made it clear that:

"The principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties. When a contract, fairly read with these principles in mind, is susceptible of a construction that dictates arbitration, the congressional policy favoring that form of dispute resolution may require the denial of judicial relief despite the possibility of fairly reading the contract to evidence a contrary intent. But, there is no occasion to resort to this congressional policy in a case where the contract, fairly read as a whole, is not susceptible of a construction that the parties bound themselves to arbitrate the dispute before the court. We conclude that this is such a case." (Footnotes omitted)

See, *Local 13, International Federation of Professional and Technical Engineers v. General Electric Company*, 531 F.2d

1178 (3d Cir. 1976); *Monongahela Power Co. v. Local* 2332, *IBEW and Local* 2357, No. 75-1329 (4th Cir. filed Feb. 9, 1976), 78 LC ¶11,281; *Communications Workers of America v. New York Telephone Co.*, 327 F.2d 94 (2d Cir. 1964);[3] *Sperry Rand v. Engineers Union*, 371 F. Supp. 198 (S.D. N.Y. 1974).

It is submitted that the Trilogy principles require the court to review the labor agreement to determine if the parties "did agree to give the arbitrator power to make the award he made."[4] That is exactly what the district court did in this case and the district court's reasoning and conclusion that the agreement could not reasonably be read to give the arbitrator power to make the award which was made was affirmed by the Third Circuit.

B. Petitioner's Claim that the Decision Is in Conflict With Other Prior Decisions of the Third Circuit Does Not Advance a Reason for Granting Certiorari and Is, in Fact, Baseless.

The Union's claim that the decision in this case conflicts with prior Third Circuit decisions does not advance any ground to grant certiorari under the criteria set forth in Rule 19 of the rules of this Court. Conflicting decisions within the circuit are properly resolved by the Court of Appeals and need not be resolved by this Court.

Moreover, the decision in this case is in full accord with prior Third Circuit decisions applying the Trilogy principles. See *Local 13, International Federation of Professional and Technical Engineers v. General Electric*

3. In the *Communications Workers* case the issue, arguments and the labor agreement were in all significant respects similar to those in the instant case. This case is discussed in the district court Opinion at 406 F. Supp. 1204-1205 (A8-10).

4. *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 at 582.

Company, 531 F.2d 1178 (3d Cir. 1976); *Affiliated Food Distributors, Inc. v. Teamsters Local* 229, 483 F.2d 418 (3d Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

The only case cited by the Union in support of its claim of conflict within the Third Circuit is *Local 103, International Union of Electrical, Radio and Machine Workers v. RCA Corporation*, 516 F.2d 1336 (3d Cir. 1975) (Petition 17). In *RCA*, the union after demanding and commencing arbitration proceedings withdrew from the arbitration and brought an action to enjoin further arbitration proceedings upon the ground that a prior arbitration decision was determinative of the grievance in issue. The union relied on a contract provision which provided that "In no event . . . shall the same question [or issue] be the subject of arbitration more than once." 516 F.2d at 1338. The *RCA* court noted that the subject matter of the dispute was covered by the arbitration provisions of the agreement and that there is little doubt that if it had been the first dispute involving job classification it would have been arbitrable. 516 F.2d at 1340. The court held that the effect of the prior arbitration award in light of the agreement's arbitration clause was for the arbitrator to decide. It, therefore, affirmed the district court's refusal to enjoin the pending arbitration proceedings.

It is submitted that the facts of the *RCA* case plainly distinguish it from the instant case. Unlike the case at bar, or the *General Electric* case,[5] the *RCA* case did not involve an express exclusionary clause which removed disputes over specific subjects from the arbitrator's jurisdiction. Nor did it involve a situation in which ". . . the contract, fairly read as a whole, is not susceptible of a construction that the parties bound themselves to arbitrate the dispute

5. In the *General Electric* case, the Third Circuit held that the agreement's management rights article which expressly excluded "assignment of work" from arbitration precluded the union from enjoining a transfer of work operations and from requiring arbitration of its grievance over the transfer. *Local 13, International Federation of Professional and Technical Engineers v. General Electric Company*, 531 F.2d 1178 (3d Cir. 1976).

before the court." *Affiliated Food Distributors, Inc. v. Teamsters Local 229*, 483 F.2d. 418 (3d Cir. 1973) at 420.

C. Contrary to the Union's Petition, the Decision in this Case Is Not in Conflict with Decisions of Other Courts of Appeals.

The Union discusses only one case in support of its claim that the decision below conflicts with decisions of other courts of appeals, *Bressette v. International Talc Co., Inc.*, 527 F.2d 211 (2d Cir. 1975). (Petition 20)[6] The *Bressette* case is plainly distinguishable from the instant case.[7] *Bressette* involved a company claim that the termination of its business terminated all obligations under its labor agreement including its obligation to arbitrate. The union claimed that the successorship clause and various other provisions of the labor agreement were violated by the company. The court stated at 527 F.2d 215:

> ". . . What the Company is really contending is not that the agreement has expired, but that the agreement, properly interpreted, imposes no obligations on the Company once it has unilaterally determined that it will terminate operations. This is not an issue of whether there is a contract, but of what the contract requires, and is for the arbitrator."

The Second Circuit, thus, found in *Bressette* that the main dispute involved the substantive effect of contract provisions and was not one of arbitrability.

Although not indicated in the Union's Petition, there was one issue in *Bressette*, concerning pension rights, which involved a question of arbitrability. On this issue the court found that, "At the very least, there is a significant question as to whether the parties meant to exclude disputes over this subsection from arbitration under the provisions of the collective bargaining agreement." 527 F.2d at 216. The court, therefore, also referred the pension dispute, including the question of arbitrability, to the arbitrator.

In the instant case the award of the arbitrator, based on the Promotion article of the labor agreement was before the court. The clear words of Section 22.04 of that article left no "significant question" and no doubt that disputes involving that article are excluded from arbitration. (A32)[8]

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6. After discussing *Bressette*, the Petition recites some general principles emphasizing the narrow scope of court review in labor arbitration, without mentioning the principles that an arbitrator's authority is confined to that provided in the labor agreement and that the question of whether an arbitrator has exceeded such authority is for the Court to decide. Following its incomplete statement of the standards for review of labor arbitration, the Petition at page 21 lists a number of cases. None of these cases involve express exclusions from arbitration, nor do they in any manner support the Union's claim of a conflict between the Third Circuit and other circuits. Toward the bottom of page 21, the Petition cites two other cases for the proposition that "The courts have been unanimous in deferring to interpretations rendered by arbitrators even where they involve the meaning of exclusionary clauses." The cases cited are *International Union of Electrical, Radio and Machine Workers v. Peerless Pressed Metal Corp.*, 489 F.2d 768 (1st Cir. 1973) and *Safeway Stores v. American Bakery and Confectionary Workers International Union*, 390 F.2d 79 (5th Cir. 1968). The cases do not involve exclusionary clauses nor do they in any manner support the proposition advanced, much less the alleged unanimity of the courts on such proposition.

7. The Union's statement of the facts and issue in the *Bressette* case refutes its conclusion that "The holding in Bressette is squarely in conflict with the decision of the Court of Appeals in the instant case." (Petition 20). That the Second Circuit is in accord with the decision below is illustrated by its decision in *Communications Workers of America v. New York Telephone Co.*, 327 F.2d 94 (2d Cir. 1964) which the district court below pointed out is "remarkably similar to the instant case." (A9).

8. "Article 22
Promotions
* * *
"22.04 It is understood that any dispute between the Union and the Company involving the terms of this Article may be grieved but shall not be subject to arbitration." (A31-32)

It is submitted that the Union's claim of a conflict between the Third Circuit and other circuit courts of appeals based solely on the *Bressette* case, is totally baseless.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Union's Petition for Writ of Certiorari be denied.

Respectfully submitted,

HUBERT THURSCHWELL
Attorney for Respondent